

that an employee is engaged each workday and each workweek in receiving remedial education, and the compensation paid each pay period for the time so engaged, as described in 29 CFR 516.34. The remedial education must be conducted during discrete periods of time set aside for such a program, and, to the maximum extent practicable, away from the employee's normal work station. An employer has the burden to establish compliance with all applicable requirements of this special overtime provision as set forth in section 7(q) of the Act and in this section of the regulations. Section 7(q) is solely an exemption from the overtime provisions of section 7(a) of the Act. It is not an exemption from the requirements of any other law that regulates employment practices, including the standards that are used to select individuals for employment. An employer creating a remedial education program pursuant to section 7(q) should be mindful not to violate other applicable requirements. See, for example, title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e *et seq.*; Executive Order 11246, as amended, 3 CFR part 339 (1964–1965 Compilation), *reprinted in* 42 U.S.C. 2000e note; the Rehabilitation Act of 1973, as amended, 29 U.S.C. 701 *et seq.*; and the Uniform Guidelines on Employee Selection Procedures published at 41 CFR part 60–3.

[56 FR 61101, Nov. 29, 1991]

## **PART 779—THE FAIR LABOR STANDARDS ACT AS APPLIED TO RETAILERS OF GOODS OR SERVICES**

### **Subpart A—General**

#### **INTRODUCTORY**

Sec.

- 779.0 Purpose of interpretative bulletin.
- 779.1 General scope of the Act.
- 779.2 Previous and new coverage.
- 779.3 Pay standards for employees subject to previous coverage of the Act.
- 779.4 Pay standards for newly covered employment.
- 779.5 Matters discussed in this part.
- 779.6 Matters discussed in other interpretative bulletins.

#### **INTERPRETATIONS OF THE LAW**

- 779.7 Significance of official interpretations.
- 779.8 Basic support for interpretations.
- 779.9 Reliance on interpretations.
- 779.10 Interpretations made, continued, and superseded by this part.

#### **SOME BASIC DEFINITIONS**

- 779.11 General statement.
- 779.12 Commerce.
- 779.13 Production.
- 779.14 Goods.
- 779.15 Sale and resale.
- 779.16 State.
- 779.17 Wage and wage payments to tipped employees.
- 779.18 Regular rate.
- 779.19 Employer, employee, and employ.
- 779.20 Person.
- 779.21 Enterprise.
- 779.22 Enterprise engaged in commerce or in the production of goods for commerce.
- 779.23 Establishment.
- 779.24 Retail or service establishment.

### **Subpart B—Employment to Which the Act May Apply: Basic Principles and Individual Coverage**

#### **GENERAL PRINCIPLES**

- 779.100 Basic coverage in general.
- 779.101 Guiding principles for applying coverage and exemption provisions.
- 779.102 Scope of this subpart.

#### **EMPLOYEES ENGAGED IN COMMERCE OR IN THE PRODUCTION OF GOODS FOR COMMERCE**

- 779.103 Employees “engaged in commerce.”
- 779.104 Employees “engaged in the production of goods for commerce.”
- 779.105 Employees engaged in activities “closely related” and “directly essential” to the production of goods for commerce.
- 779.106 Employees employed by an independent employer.
- 779.107 Goods defined.
- 779.108 Goods produced for commerce.
- 779.109 Amount of activities which constitute engaging in commerce or in the production of goods for commerce.
- 779.110 Employees in retailing whose activities may bring them under the Act.
- 779.111 Buyers and their assistants.
- 779.112 Office employees.
- 779.113 Warehouse and stock room employees.
- 779.114 Transportation employees.
- 779.115 Watchmen and guards.
- 779.116 Custodial and maintenance employees.
- 779.117 Salesmen and sales clerks.
- 779.118 Employees providing central services for multi-unit organizations.

## Wage and Hour Division, Labor

Pt. 779

779.119 Exempt occupations.

### Subpart C—Employment to Which the Act May Apply; Enterprise Coverage

#### ENTERPRISE; THE BUSINESS UNIT

779.200 Coverage expanded by 1961 and 1966 amendments.

779.201 The place of the term “enterprise” in the Act.

779.202 Basic concepts of definition.

779.203 Distinction between “enterprise,” “establishment,” and “employer.”

779.204 Common types of “enterprise.”

#### RELATED ACTIVITIES

779.205 Enterprise must consist of “related activities.”

779.206 What are “related activities.”

779.207 Related activities in retail operations.

779.208 Auxiliary activities which are “related activities.”

779.209 Vertical activities which are “related activities.”

779.210 Other activities which may be part of the enterprise.

779.211 Status of activities which are not “related.”

#### COMMON BUSINESS PURPOSE

779.212 Enterprise must consist of related activities performed for a “common business purpose.”

779.213 What is a common business purpose.

779.214 “Business” purpose.

#### UNIFIED OPERATION OR COMMON CONTROL

779.215 General scope of terms.

779.216 Statutory construction of the terms.

779.217 “Unified operation” defined.

779.218 Methods to accomplish “unified operation.”

779.219 Unified operation may be achieved without common control or common ownership.

779.220 Unified operation may exist as to separately owned or controlled activities which are related.

779.221 “Common control” defined.

779.222 Ownership as factor.

779.223 Control where ownership vested in individual or single organization.

779.224 Common control in other cases.

#### LEASED DEPARTMENTS, FRANCHISE AND OTHER BUSINESS ARRANGEMENTS

779.225 Leased departments.

779.226 Exception for an independently owned retail or service establishment under certain franchise and other arrangements.

779.227 Conditions which must be met for exception.

779.228 Types of arrangements contemplated by exception.

779.229 Other arrangements.

779.230 Franchise and other arrangements.

779.231 Franchise arrangements which do not create a larger enterprise.

779.232 Franchise or other arrangements which create a larger enterprise.

779.233 Independent contractors performing work “for” an enterprise.

779.234 Establishments whose only regular employees are the owner or members of his immediate family.

779.235 Other “enterprises.”

#### COVERED ENTERPRISES

779.236 In general.

779.237 Enterprise engaged in commerce or in the production of goods for commerce.

779.238 Engagement in described activities determined on annual basis.

779.239 Meaning of “engaged in commerce or in the production of goods for commerce.”

#### EMPLOYEES HANDLING, SELLING, OR OTHERWISE WORKING ON GOODS THAT HAVE BEEN MOVED IN OR PRODUCED FOR COMMERCE BY ANY PERSON

779.240 Employees “handling \* \* \* or otherwise working on goods.”

779.241 Selling.

779.242 Goods that “have been moved in” commerce.

779.243 Goods that have been “produced for commerce by any person.”

#### COVERED RETAIL ENTERPRISE

779.244 “Covered enterprises” of interest to retailers of goods or services.

779.245 Conditions for coverage of retail or service enterprises.

#### INTERSTATE INFLOW TEST UNDER PRIOR ACT

779.246 Inflow test under section 3(s)(1) of the Act prior to 1966 amendments.

779.247 “Goods” defined.

779.248 Purchase or receive “goods for resale.”

779.249 Goods which move or have moved across State lines.

779.250 Goods that have not lost their out-of-State identity.

779.251 Goods that have lost their out-of-State identity.

779.252 Not in deliveries from the reselling establishment.

779.253 What is included in computing the total annual inflow volume.

#### THE GASOLINE SERVICE ESTABLISHMENT ENTERPRISE

779.254 Summary of coverage and exemptions prior to and following the 1966 amendments.

779.255 Meaning of “gasoline service establishment.”

**Pt. 779**

**29 CFR Ch. V (7–1–06 Edition)**

- 779.256 Conditions for enterprise coverage of gasoline service establishments.  
779.257 Exemption applicable to gasoline service establishments under the prior Act.

**ANNUAL GROSS VOLUME OF SALES MADE OR BUSINESS DONE**

- 779.258 Sales made or business done.  
779.259 What is included in annual gross volume.  
779.260 Trade-in allowances.

**EXCISE TAXES**

- 779.261 Statutory provision.  
779.262 Excise taxes at the retail level.  
779.263 Excise taxes not at the retail level.  
779.264 Excise taxes separately stated.

**COMPUTING THE ANNUAL VOLUME**

- 779.265 Basis for making computations.  
779.266 Methods of computing annual volume of sales or business.  
779.267 Fluctuations in annual gross volume affecting enterprise coverage and establishment exemptions.  
779.268 Grace period of 1 month for computation.  
779.269 Computations for a new business.

**Subpart D—Exemptions for Certain Retail or Service Establishments**

**GENERAL PRINCIPLES**

- 779.300 Purpose of subpart.  
779.301 Statutory provisions.

**“ESTABLISHMENT” BASIS OF EXEMPTIONS**

- 779.302 Exemptions depend on character of establishment.  
779.303 “Establishment” defined; distinguished from “enterprise” and “business.”  
779.304 Illustrations of a single establishment.  
779.305 Separate establishments on the same premises.  
779.306 Leased departments not separate establishments.  
779.307 Meaning and scope of “employed by” and “employee of.”  
779.308 Employed within scope of exempt business.  
779.309 Employed “in” but not “by.”  
779.310 Employees of employers operating multi-unit businesses.  
779.311 Employees working in more than one establishment of same employer.

**STATUTORY MEANING OF RETAIL OR SERVICE ESTABLISHMENT**

- 779.312 “Retail or service establishment”, defined in section 13(a)(2).  
779.313 Requirements summarized.

**MAKING SALES OF GOODS AND SERVICES “RECOGNIZED AS RETAIL”**

- 779.314 “Goods” and “services” defined.  
779.315 Traditional local retail or service establishments.  
779.316 Establishments outside “retail concept” not within statutory definition; lack first requirement.  
779.317 Partial list of establishments lacking “retail concept.”  
779.318 Characteristics and examples of retail or service establishments.  
779.319 A retail or service establishment must be open to general public.  
779.320 Partial list of establishments whose sales or service may be recognized as retail.  
779.321 Inapplicability of “retail concept” to some types of sales or services of an eligible establishment.

**“RECOGNIZED” AS RETAIL “IN THE PARTICULAR INDUSTRY”**

- 779.322 Second requirement for qualifying as a “retail or service establishment.”  
779.323 Particular industry.  
779.324 Recognition “in.”  
779.325 Functions of the Secretary and the courts.  
779.326 Sources of information.  
779.327 Wholesale sales.  
779.328 Retail and wholesale distinguished.  
779.329 Effect of type of customer and type of goods or services.

**SALES NOT MADE FOR RESALE**

- 779.330 Third requirement for qualifying as a “retail or service establishment.”  
779.331 Meaning of sales “for resale.”  
779.332 Resale of goods in an altered form or as parts or ingredients of other goods or services.  
779.333 Goods sold for use as raw materials in other products.  
779.334 Sales of services for resale.  
779.335 Sales of building materials for residential or farm building construction.  
779.336 Sales of building materials for commercial property construction.

**GENERAL TESTS OF EXEMPTION UNDER SECTION 13(a)(2)**

- 779.337 Requirements of exemption summarized.  
779.338 Effect of 1961 and 1966 amendments.

**SALES MADE WITHIN THE STATE**

- 779.339 More than 50 percent intrastate sales required.  
779.340 Out-of-State customers.  
779.341 Sales “made within the State” and “engagement in commerce” distinguished.

## Wage and Hour Division, Labor

## Pt. 779

### COMPUTING ANNUAL DOLLAR VOLUME AND COMBINATION OF EXEMPTIONS

779.342 Methods of computing annual volume of sales.

779.343 Combinations of exemptions.

### ENGAGING IN MANUFACTURING AND PROCESSING ACTIVITIES; SECTION 13(a)(4)

779.345 Exemption provided in section 13(a)(4).

779.346 Requirements for exemption summarized.

779.347 Exemption limited to "recognized retail establishment"; factories not exempt.

779.348 Goods must be made at the establishment which sells them.

779.349 The 85-percent requirement.

779.350 The section 13(a)(4) exemption does not apply to service establishments.

### ENGAGING IN CONTRACT TELEGRAPH AGENCY OPERATIONS; SECTION 13(a)(11)

779.351 Exemption provided.

779.352 Requirements for exemption.

### CLASSIFICATION OF SALES AND ESTABLISHMENTS IN CERTAIN INDUSTRIES

779.353 Basis for classification.

### LUMBER AND BUILDING MATERIALS DEALERS

779.354 Who may qualify as exempt 13(a)(2) or 13(a)(4) establishments.

779.355 Classification of lumber and building materials sales.

779.356 Application of exemptions to employees.

### COAL DEALERS

779.357 May qualify as exempt 13(a)(2) establishments; classification of coal sales.

### ICE MANUFACTURERS AND ICE DEALERS

779.358 May qualify as exempt 13(a)(2) or 13(a)(4) establishments.

### LIQUEFIED-PETROLEUM-GAS AND FUEL OIL DEALERS

779.359 May qualify as exempt 13(a)(2) establishments.

779.360 Classification of liquefied-petroleum-gas sales.

779.361 Classification of other fuel oil sales.

### FEED DEALERS

779.362 May qualify as exempt 13(a)(2) or 13(a)(4) establishments.

### MONUMENT DEALERS

779.363 May qualify as exempt 13(a)(2) or 13(a)(4) establishments.

### FROZEN-FOOD LOCKER PLANTS

779.364 May qualify as exempt 13(a)(2) or 13(a)(4) establishments.

### AUTOMOTIVE TIRE ESTABLISHMENTS

779.365 May qualify as exempt 13(a)(2) or 13(a)(4) establishments.

779.366 Recapping or retreading tires for sale.

### COMMERCIAL STATIONERS

779.367 Commercial stationers may qualify as exempt 13(a)(2) establishments.

779.368 Printing and engraving establishments not recognized as retail.

### FUNERAL HOMES

779.369 Funeral home establishments may qualify as exempt 13(a)(2) establishments.

### CEMETERIES

779.370 Cemeteries may qualify as exempt 13(a)(2) establishments.

### AUTOMOBILE, TRUCK, FARM IMPLEMENT, TRAILER, AND AIRCRAFT SALES AND SERVICES

779.371 Some automobile, truck, and farm implement establishments may qualify for exemption under section 13(a)(2).

779.372 Nonmanufacturing establishments with certain exempt employees under section 13(b)(10).

### OTHER ESTABLISHMENTS FOR WHICH SPECIAL EXCEPTIONS OR EXEMPTIONS ARE PROVIDED

779.381 Establishments within special exceptions or exemptions.

### HOTELS AND MOTELS

779.382 May qualify as exempt 13(a)(2) establishments.

779.383 "Hotel" and "motel" exemptions under section 13(b)(8).

### MOTION PICTURE THEATERS

779.384 May qualify as exempt establishments.

### SEASONAL AMUSEMENT OR RECREATIONAL ESTABLISHMENTS

779.385 May qualify as exempt establishments.

### RESTAURANTS AND ESTABLISHMENTS PROVIDING FOOD AND BEVERAGE SERVICE

779.386 Restaurants may qualify as exempt 13(a)(2) establishments.

779.387 "Restaurant" exemption under section 13(b)(8).

## § 779.0

779.388 Exemption provided for food or beverage service employees.

### Subpart E—Provisions Relating to Certain Employees of Retail or Service Establishments

#### GENERAL PRINCIPLES

779.400 Purpose of subpart.

#### EXECUTIVE, ADMINISTRATIVE, AND PROFESSIONAL EMPLOYEES AND OUTSIDE SALESMEN

779.401 Statutory provision.

779.402 "Executive" and "administrative" employees defined.

779.403 Administrative and executive employees in covered enterprises employed in other than retail or service establishments.

779.404 Other section 13(a)(1) employees employed in covered enterprises.

#### STUDENTS, LEARNERS, AND HANDICAPPED WORKERS

779.405 Statutory provisions.

779.406 "Student-learners."

779.407 Learners other than "student-learners."

779.408 "Full-time students."

779.409 Handicapped workers.

#### EMPLOYEES COMPENSATED PRINCIPALLY BY COMMISSIONS

779.410 Statutory provision.

779.411 Employee of a "retail or service establishment."

779.412 Compensation requirements for overtime pay exemption under section 7(i).

779.413 Methods of compensation of retail store employees.

779.414 Types of employment in which this overtime pay exemption may apply.

779.415 Computing employee's compensation for the representative period.

779.416 What compensation "represents commissions."

779.417 The "representative period" for testing employee's compensation.

779.418 Grace period for computing portion of compensation representing commissions.

779.419 Dependence of the section 7(i) overtime pay exemption upon the level of the employee's "regular rate" of pay.

779.420 Recordkeeping requirements.

779.421 Basic rate for computing overtime compensation of nonexempt employees receiving commissions.

## 29 CFR Ch. V (7–1–06 Edition)

### Subpart F—Other Provisions Which May Affect Retail Enterprises

#### GENERAL

779.500 Purpose of subpart.

#### EQUAL PAY PROVISIONS

779.501 Statutory provisions.

#### CHILD LABOR PROVISIONS

779.502 Statutory provisions; regulations in Part 1500 of this title.

779.503 The retailer and section 12(a).

779.504 The retailer and section 12(c).

779.505 "Oppressive child labor" defined.

779.506 Sixteen-year minimum.

779.507 Fourteen-year minimum.

779.508 Eighteen-year minimum.

#### DRIVER OR DRIVER'S HELPER MAKING LOCAL DELIVERIES

779.509 Statutory provision.

779.510 Conditions that must be met for section 13(b) (11) exemption.

779.511 "Finding by Secretary."

#### RECORDS TO BE KEPT BY EMPLOYERS

779.512 The recordkeeping regulations.

779.513 Order and form of records.

779.514 Period for preserving records.

779.515 Regulations should be consulted.

AUTHORITY: Secs. 1–19, 52 Stat. 1060, as amended; 75 Stat. 65; 29 U.S.C. 201–219.

SOURCE: 35 FR 5856, Apr. 9, 1970, unless otherwise noted.

### Subpart A—General

#### INTRODUCTORY

#### § 779.0 Purpose of interpretative bulletin.

It is the purpose of this part to provide an official statement of the views of the Department of Labor with respect to the application and meaning of those provisions of the Fair Labor Standards Act, hereinafter referred to as the Act, which govern rights and obligations of employees and employers in the various enterprises in which retail sales of goods or services are made. The application of the Act to employment in such enterprises was greatly broadened by amendments effective September 3, 1961. The Act's application was extended to employment in additional retail and service enterprises by the Fair Labor Standards Amendments of 1966, effective February 1, 1967. Under the amended Act,

## **Wage and Hour Division, Labor**

## **§ 779.2**

there are many employees employed by retail or service establishments and in enterprises having such establishments engaged in the retail selling of goods or services who must be employed in compliance with its provisions. It is an objective of this part to make available in one place, for the guidance of those who may be concerned with the provisions of the law, the official interpretations of these provisions by which the Department of Labor will be guided in carrying out its responsibilities under the Act.

### **§ 779.1 General scope of the Act.**

The Fair Labor Standards Act of 1938, as amended, is a Federal statute of general application which establishes minimum wage, maximum hours, overtime pay, equal pay, and child labor requirements that apply as provided in the Act. Employers and employees in enterprises in which retail sales of goods or services are made need to know how the Act applies to employment in these enterprises so that they may understand their rights and obligations under the law. All employees whose employment has the relationship to interstate or foreign commerce which the Act specifies are subject to the prescribed labor standards unless specifically exempted from them. Employers having such employees are required to comply with the Act's provisions in this regard and with specified recordkeeping requirements contained in Part 516 of this chapter. The law authorizes the Department of Labor to investigate for compliance and, in the event of violations, to supervise the payment of unpaid minimum wages or unpaid overtime compensation owing to any employee. The law also provides for enforcement in the courts.

### **§ 779.2 Previous and new coverage.**

Under the Act as amended in 1966, an employer may have some employees subject to its minimum wages, maximum hours, overtime pay, equal pay, or child labor provisions who would be covered by such provisions under the prior law even if the amendments had not been enacted, and other employees whose coverage under such provisions was provided for the first time by the 1966 amendments. As explained in sub-

parts B and C such provisions of the amended Act may apply to an employee by reason of the activities in which he is individually engaged, or because he is employed in an enterprise whose activities satisfy the conditions prescribed in the law prior to the amendments. On the other hand, such provisions of the amended Act may apply to an employee solely because he is employed in an enterprise whose activities satisfy only the conditions provided in the Act as it was amended in 1966. Previously covered employment in retail and service enterprise is subject to different monetary standards than newly covered employment in such enterprises until February 1, 1971. On and after that date, every such employee subject to the minimum wage provisions will be entitled to not less than \$1.60 an hour. However, beginning February 1, 1969, every such employee subject to the overtime provisions is entitled to overtime pay for all hours worked in excess of 40 in a workweek at a rate not less than one and one-half times his regular rate of pay. During the period for which different minimum wage provisions were made applicable, beginning with the effective date of the 1966 amendments on February 1, 1967, and ending on January 31, 1971, a lower minimum wage rate is authorized for employees in employment brought under the minimum wage provisions of the Act for the first time by the amendments than for those subject to the minimum wage provisions under the prior Act. Also, in the period beginning with the effective date of the amendments and ending on January 31, 1969, employees in employment brought under the overtime pay provisions for the first time by the amendments could be employed for a longer workweek without overtime pay, as specified in the Act. Accordingly, employers who do not wish to pay all covered employees for employment during such periods the minimum wages and overtime pay required for employment covered under the prior provisions will need to identify those employees who are covered under the prior provisions and those who are covered under the new provisions when wages are computed and paid under the Act.